



C-549-838

Investigation

POI: 1/1/2017 – 12/31/2017

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July 29, 2019

MEMORANDUM TO: Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance

FROM: James Maeder
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Negative
Determination of the Countervailing Duty Investigation of Glycine
from Thailand

I. SUMMARY

The Department of Commerce (Commerce) determines that countervailable subsidies are not being provided to producers of glycine from Thailand, as provided in section 705 of the Tariff Act of 1930, as amended (the Act). The period of investigation (POI) is January 1, 2017 through December 31, 2017. This investigation covers one mandatory respondent, Newtrend Food Ingredient (Thailand) Co., Ltd. (Newtrend Thailand).

After analyzing the comments submitted by interested parties, and based on our verification findings, we have not made changes to the *Preliminary Determination* or the Post-Preliminary Determination.¹ We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum. Below is the complete list of the issues in this countervailing duty (CVD) investigation for which we received comments from interested parties:

Issues

- Comment 1: Whether to Apply Adverse Facts Available (AFA) to Newtrend Thailand for Third-Country Affiliates Disclosed at Verification
- Comment 2: Whether Bangkok Bank is an Authority

¹ See *Glycine from Thailand: Preliminary Negative Countervailing Duty Determination, Preliminary Negative Critical Circumstances Determination, and Alignment of Final Determination with Final Antidumping Duty Determination*, 83 FR 44861 (September 4, 2018) (*Preliminary Determination*) and accompanying Preliminary Decision Memorandum (PDM); see also Memorandum, “Decision Memorandum for the Post-Preliminary Analysis in the Countervailing Duty Investigation of Glycine from Thailand,” dated February 21, 2019 (Post-Preliminary Determination).



- Comment 3: Whether the Provision of Electricity for Less than Adequate Remuneration (LTAR) is Countervailable
- Comment 4: Whether Commerce Should Have Used Thai Electricity Export Prices as a Benchmark in the Provision of Electricity for LTAR Benefit Calculation
- Comment 5: Whether the Exemptions of Import Duty on Raw or Essential Materials Imported for Use in Production for Export (Investment Promotion Act (IPA) Section 36) Program is Countervailable
- Comment 6: Application of AFA
- Comment 7: *CBP Interim Measures*

II. BACKGROUND

The mandatory respondent in this investigation is Newtrend Thailand. On September 4, 2018, Commerce published the *Preliminary Determination* in this investigation and aligned this final CVD determination with the final antidumping duty (AD) determination, in accordance with section 705(a)(1) of the Act and 19 CFR 351.210(b)(4)(i).²

From November 5 through 9, 2018, we conducted verification at the offices of the Royal Thai Government (the RTG) and Newtrend Thailand, in accordance with section 782(i) of the Act.³ On February 21, 2019, Commerce issued a Post-Preliminary Determination regarding programs alleged in the petitioners' new subsidy allegations (NSA).⁴

Commerce exercised its discretion to toll all deadlines affected by the partial federal government closure from December 22, 2018 through the resumption of operations on January 29, 2019.⁵ The revised deadline for the final determination of this investigation was April 24, 2019.

We invited parties to comment on the *Preliminary Determination* and Post-Preliminary Determination. On March 11, 2019, we received case briefs from the petitioners,⁶ Newtrend Thailand, and the RTG.⁷ On March 18, 2019, we received rebuttal briefs from the petitioners, Newtrend Thailand, and the RTG.⁸

² See *Preliminary Determination* PDM.

³ See Memoranda, "Verification of the Questionnaire Responses of the Royal Thai Government" (RTG Verification Report), and "Verification of the Questionnaire Responses of Newtrend Food Ingredient (Thailand) Co., Ltd." (CVD Verification Report), both dated December 7, 2018.

⁴ See Post-Preliminary Determination.

⁵ See Memorandum to the Record from Gary Taverman, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance, "Deadlines Affected by the Partial Shutdown of the Federal Government," dated January 28, 2019. All deadlines in this segment of the proceeding have been extended by 40 days.

⁶ GEO Specialty Chemicals, Inc. and Chatterm Chemicals, Inc. (collectively, the petitioners).

⁷ See Petitioners' Letter, "Glycine from Thailand: Petitioners' Case Brief" (Petitioners' Case Brief I); RTG's Letter, "Countervailing Duty Investigation of Glycine from Thailand: Case Brief of Royal Thai Government"; and Newtrend Thailand's Letter, "Glycine from Thailand: Case Brief," all dated March 11, 2019.

⁸ See Petitioners' Letters, "Glycine from Thailand: Petitioners' Rebuttal Case Brief in Response to Newtrend Food Ingredient (Thailand) Co., Ltd.'s Case Brief" (Petitioners' Rebuttal Brief IA), and "Glycine from Thailand: Petitioners' Rebuttal Case Brief in Response to the Royal Thai Government's Case Brief" (Petitioners' Rebuttal Brief IB); RTG's Letter, "Countervailing Duty Investigation of Glycine from Thailand: Rebuttal Brief of Royal

On March 18, 2019, the petitioners submitted new factual information (NFI) on the record of this CVD investigation, which included the notice of U.S. Customs and Border Protection's (CBP) commencement of a formal investigation and imposition of interim measures (*CBP Interim Measures*) under Title IV, Section 421 of the Trade Facilitation and Trade Enforcement Act of 2015 (also referred to as the Enforce and Protect Act or EAPA).⁹

In summary, the *CBP Interim Measures*, which was publicly released on March 13, 2019, stated that, on October 16, 2018, CBP had initiated an investigation under EAPA as a result of an allegation "that Newtrend USA¹⁰ evaded AD order A-570-836 on glycine from China by transshipping Chinese-origin glycine through Thailand, and upon customs entry into the United States, declared the merchandise as a product of Thailand and not subject to the AD order."¹¹ The *CBP Interim Measures* stated further that, based on the evidence on CBP's record, "there is a reasonable suspicion that Newtrend USA entered covered merchandise into the customs territory of the United States through evasion by means of transshipment through Thailand."¹² CBP's ongoing investigation covers the time period September 24, 2017, through the pendency of its investigation, and CBP's investigation period¹³ overlaps the POI of both the less than fair value (LTFV) and CVD investigations. The *CBP Interim Measures* were based in part on evidence it received in support of six allegations.¹⁴

On March 26, 2019, we accepted the NFI Submission and provided parties in this investigation the opportunity to submit NFI to rebut, clarify, or correct the information in the petitioners' NFI

Thai Government," (RTG's Rebuttal Brief I); and Newtrend Thailand's Letter, "Glycine from Thailand: Rebuttal Brief," (Newtrend Thailand's Rebuttal Brief I), all dated March 18, 2019.

⁹ See Petitioners' Letter, "Glycine from Thailand: Request to Accept U.S. Customs and Border Protection's Interim Measures," dated March 18, 2019 (NFI Submission), including *CBP Interim Measures* at Exhibit 1.

¹⁰ Newtrend USA Co., Ltd. (Newtrend USA) is Newtrend Thailand's wholly-owned U.S. subsidiary. See Memorandum, "U.S. Verification of the Sales Response of Newtrend Food Ingredient (Thailand) Co., Ltd. in the Antidumping Investigation of Glycine from Thailand," dated March 14, 2019, at 5 (which is included in Newtrend Thailand's Letter, "Glycine from Thailand: Response to Petitioners' Request to Take Notice of U.S. Customs and Border Protection's Interim Measures," dated March 20, 2019, at Attachment 1).

¹¹ See *CBP Interim Measures*, at 2.

¹² *Id.* at 4.

¹³ *Id.* at 2.

¹⁴ These allegations, quoted from the *CBP Interim Measures*, are: (1) "Newtrend Food Ingredient (Thailand) Co., Ltd. ('Newtrend Thailand'), an affiliate of Newtrend USA located in Thailand, supplies glycine to Newtrend USA"; (2) "Newtrend Thailand cannot be considered to be a Thai producer of glycine due to the lack of an adequate volume of raw materials necessary to produce the amount of glycine exported to the United States"; (3) "[E]vidence suggests that there did not exist adequate volume of the major raw materials of glycine production, mono-chloro acetic acid ('MCAA') and hexamine, to support the production of glycine in the country of Thailand"; (4) "Newtrend USA and its affiliates are purchasing Chinese-origin glycine or intermediate glycine products, shipping the glycine from China to Thailand, then re-exporting that same Chinese-origin glycine to the United States while claiming Thailand as the country of origin"; (5) "Newtrend Thailand is not a *bona fide* producer of Thai-origin glycine and, instead, sources Chinese-origin glycine for transshipment through Thailand to the United States, claiming Thailand as the country of origin"; and (6) "Newtrend Thailand did not have access to an adequate volume of the major raw materials of glycine production, MCAA and hexamine, to support the production of glycine it exported to the United States."

Submission.¹⁵ In accepting this information, we noted that Commerce would have added this information to the record itself under 19 CFR 351.301(c)(4), had petitioner not submitted the information. On April 2, and 9, 2019, the petitioners and Newtrend Thailand submitted NFI¹⁶ and comments with respect to the NFI Submission, including the *CBP Interim Measures* on the record of this investigation.¹⁷ In light of the NFI Submission and comments, we postponed until further notice the issuance of the final determination in this investigation on April 24, 2019, to further examine the issues raised in the *CBP Interim Measures*.¹⁸

In May and June 2019, Newtrend Thailand submitted responses¹⁹ to Commerce's supplemental questionnaires.²⁰ We also received pre-verification comments from the petitioners and rebuttal comments from Newtrend Thailand.²¹ We conducted verification from June 3 through 13, 2019.

On June 20, 2019, we issued a second set of verification reports based on the verifications conducted of the data reported by Newtrend Thailand and its Chinese affiliated companies in response to Commerce's supplemental questionnaires, in accordance with section 782(i) of the Act.²²

¹⁵ See Memorandum, "Countervailing Duty Investigation of Glycine from Thailand: Acceptance of New Factual Information Submitted by Petitioners and Newtrend and Schedule for Rebuttal New Factual Information," dated March 26, 2019.

¹⁶ See Petitioners' Letter, "Glycine from Thailand: Petitioners' NFI Comments on CBP's Interim Measures Decision" (Petitioners' Comments); and Newtrend Thailand's Letter, "Glycine from Thailand: New Factual Information to Rebut, Clarify, or Correct the New Factual Information in the Petitioners' Submission," both dated April 2, 2019.

¹⁷ See Petitioners' Letter, "Glycine from Thailand: Petitioners' Surrebuttal New Factual Information"; and Newtrend Thailand's Letter, "Glycine from Thailand: Surrebuttal New Factual Information to the New Factual Information in the Petitioners' Submission," both dated April 9, 2019.

¹⁸ See Memorandum from Gary Taverman, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Jeffrey I. Kessler, Assistant Secretary for Enforcement and Compliance, "Postponement of the Final Determinations in the Less-Than-Fair Value and Countervailing Duty Investigations of Glycine from Thailand," dated April 24, 2019.

¹⁹ See Newtrend Thailand's Letter, "Countervailing Duty Investigation of Glycine from Thailand: Newtrend Response to Supplemental Questionnaire Regarding Transshipment Allegation," dated May 20, 2019 (May 20 SQR); and Newtrend Thailand's Letter, "Antidumping Duty Investigation of Glycine from Thailand: Newtrend Response to Second Supplemental Questionnaire Regarding Transshipment, Allegation," dated May 28, 2018.

²⁰ See Commerce's Letter, "Countervailing Duty Investigation of Glycine from Thailand: Supplemental Questionnaire Regarding Transshipment Allegations," dated April 30, 2019; and Commerce's Letter, "Antidumping and Countervailing Duty Investigations of Glycine from Thailand: Second Supplemental Questionnaire Regarding Transshipment Allegations," dated May 21, 2019.

²¹ See Petitioners' Letter, "(Corrected) Glycine from Thailand: Petitioners' Pre-Verification Comments for the Department's Transshipment Verifications," dated May 31, 2019; and Newtrend Thailand's Letter, "Antidumping Duty Investigation of Glycine from Thailand: Newtrend Thailand's Rebuttal Regarding Petitioners' Pre-Verification Comments," dated June 4, 2019; see also Memoranda, "Antidumping and Countervailing Duty Investigations of Glycine from Thailand: Rejection of the Petitioners' Pre-Verification Comments," both dated June 3, 2019 (rejecting the petitioners' originally filed pre-verification comments and allowing the petitioners to submit a revised version and retaining a copy of the rejected version on the official record).

²² See Memoranda, "Verification of the Questionnaire Response of Newtrend Food Ingredient (Thailand) Co., Ltd. in the Countervailing Investigation of Glycine from Thailand with Respect to the Transshipment Allegation" (2nd Sales Verification Report); and "2nd Verification of Cost Response of Newtrend Food Ingredient (Thailand) Co., Ltd. in the Countervailing Duty Investigation of Glycine from Thailand" (2nd Cost Verification Report), both dated June 20, 2019.

In June and July, 2019, the petitioners and Newtrend Thailand submitted their second case and rebuttal briefs limited to issues raised and information placed on the record after the submission of the initial case and rebuttal briefs submitted on March 11 and 18, 2019, respectively.²³ At the request of the petitioners, Commerce held a public hearing limited to issues raised in the case and rebuttal briefs on July 12, 2019.²⁴

III. SCOPE OF THE INVESTIGATION

The product covered by this investigation is glycine from Thailand. For a full description of the scope of this investigation, *see* the accompanying *Federal Register* notice at Appendix I.

IV. SUBSIDIES VALUATION

A. Allocation Period

Commerce made no changes to, and interested parties raised no issues in their case briefs regarding, the allocation period or the allocation methodology used in the *Preliminary Determination* and Post-Preliminary Determination. For a description of the allocation period and the methodology used for this final determination, *see* the *Preliminary Determination*.²⁵

B. Attribution of Subsidies

Commerce made no changes to, and interested parties raised no issues in their case briefs regarding, the attribution of subsidies used in the *Preliminary Determination* and Post-Preliminary Determination. For a description of the methodologies used for this final determination, *see* the *Preliminary Determination*.²⁶

C. Denominators

Commerce made no changes to, and interested parties raised no issues in their case briefs regarding, the denominators used in the *Preliminary Determination* and Post-Preliminary

²³ See Petitioners' Letter, "Glycine from Thailand: Petitioners' Case Brief," dated June 28, 2019 (Petitioners' Case Brief II); Newtrend Thailand's Letter, "Antidumping and Countervailing Duty Investigations of Glycine from Thailand: Case Brief," dated July 11, 2019 (Newtrend Thailand's Case Brief II); Petitioners' Letter, "Glycine from Thailand: Petitioners' Rebuttal Brief," dated July 5, 2019 (Petitioners' Rebuttal Brief II); and Newtrend Thailand's Letter, "Antidumping and Countervailing Duty Investigations of Glycine from Thailand: Newtrend's Rebuttal Brief," dated July 11, 2019 (Newtrend Thailand's Rebuttal Brief II); *see also* Commerce's Letter, "Countervailing Duty Investigation of Glycine from Thailand: Rejection of New Factual Information in Case and Rebuttal Brief," dated July 10, 2019 (rejecting Newtrend Thailand's originally filed case and rebuttal briefs and allowing Newtrend Thailand to submit revised versions); and Memorandum, "Countervailing Duty Investigation of Glycine from Thailand: Reject and Remove Documents from the Record," dated July 10, 2019.

²⁴ See Transcript, "In the Matter of: the Antidumping and Countervailing Duty Investigations of Glycine from Thailand," dated July 12, 2019.

²⁵ See *Preliminary Determination* PDM at 4.

²⁶ *Id.* at 4-5.

Determination for Newtrend Thailand. For a description of the methodologies used for this final determination, *see the Preliminary Determination*.²⁷

V. ANALYSIS OF PROGRAMS

A. Programs Determined to Be Countervailable

1. *The Provision of Electricity for LTAR*

As discussed in Comments 3 and 4 below, we made no changes to our Post-Preliminary Determination with respect to the methodology used to calculate the subsidy rate for this program. For the description, analysis, and calculation methodology of the program, *see the Post-Preliminary Determination*.²⁸ The rate for Newtrend Thailand continues to be 0.06 percent *ad valorem*.²⁹

B. Programs Determined to Be Not Countervailable

1. *Exemption of Import Duty on Raw or Essential Materials Imported for Use in Production for Export (IPA Section 36)*

As discussed in Comment 5 below, we made no changes to our *Preliminary Determination* with respect to the non-countervailability aspect of this program. For the description and analysis of the program, *see the Preliminary Determination*.³⁰

C. Programs Determined Not to Be Used

Commerce made no changes to its *Preliminary Determination* and Post-Preliminary Determination with regard to programs determined not to be used by Newtrend Thailand during the POI.³¹

1. *Duty Exemption on Import of Machinery (IPA Section 28)*
2. *Reduction of Import Duties for Raw or Essential Materials (IPA Section 30)*
3. *Exemption of Corporate Income Tax on Net Profit from the Promoted Activity (IPA Section 31)*
4. *Exemption of Income Tax on Dividends Derived from the Promoted Activity (IPA Section 34)*
5. *Additional Income Tax Deductions (IPA Section 35)*
6. *The Industrial Estate Authority of Thailand (I-EA-T)*
7. *Measures to Promote Improvement of Production Efficiency*
8. *The Export-Import Bank of Thailand's Medium-Term and Long-Term Loan and Buyer's Credit Programs*

²⁷ *Id.* at 5.

²⁸ *See* Post-Preliminary Determination at 2-11.

²⁹ *Id.* at 11.

³⁰ *See Preliminary Determination PDM* at 5-7.

³¹ *Id.* at 7; *see* Post-Preliminary Determination at 2.

9. *Board of Investment (BOI) Measures to Promote Investment in Food Innovation*
10. *Tax Coupons on Exported Goods*
11. *The Provision of Electricity by Small Power Producers (SPPs) to Industrial Users in Industrial Estates at LTAR*

VI. DISCUSSION OF THE ISSUES

Comment 1: Whether to Apply AFA to Newtrend Thailand for Third-Country Affiliates Disclosed at Verification

Petitioners' Case Brief I³²

- In its initial questionnaire response, Newtrend Thailand only reported its parent company, Newtrend Technology Co., Ltd, and its U.S. subsidiary, Newtrend USA as cross-owned affiliates. Newtrend Thailand subsequently revised its affiliation response to include four more companies as affiliates.³³
- At verification, Commerce uncovered several previously undisclosed affiliates. Newtrend Thailand failed to report all of its affiliates as requested by Commerce, even if none are cross-owned with Newtrend Thailand or involved in the production or sale of glycine.³⁴
- In *Hardwood Plywood from China*, Commerce applied total AFA to a mandatory respondent because it failed to identify an affiliate in its questionnaire response until late in the proceeding.³⁵
- Cross-ownership under 19 CFR 351.525(b)(6) is not limited to affiliates involved in the production or sale of subject merchandise or whether affiliates are based in Thailand. Newtrend Thailand made its own judgment on what affiliate information was required and deprived Commerce of the ability to investigate whether the undisclosed affiliates satisfied the cross-ownership or attribution criteria.³⁶
- Newtrend Thailand's failure to report affiliates in a timely manner casts doubts on the reliability and accuracy of its questionnaire responses. Commerce was unable to verify Newtrend Thailand's web of affiliates as it relies on sampling and spot checks at verification and Commerce was unable to verify non-use programs with the RTG.³⁷
- Commerce should apply total AFA to Newtrend Thailand for its failure to submit information in the form and manner requested and for its failure to cooperate to the best

³² See Petitioner's Case Brief I at 5-16.

³³ *Id.* at 5-6.

³⁴ *Id.* at 7-11 (citing *Nippon Steel Corp. v. United States*, 337 F. 3d 1373, 1384 (CAFC 2003)).

³⁵ *Id.* at 11-13 (citing *Certain Hardwood Plywood Products from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination, Preliminary Affirmative Critical Circumstances Determination, in Part, and Alignment of Final Determination with Final Antidumping Duty Determination*, 82 FR 19002 (April 25, 2017), and accompanying PDM at Section XI.B., unchanged in *Countervailing Duty Investigation of Certain Hardwood Plywood Products from the People's Republic of China: Final Affirmative Determination, and Final Affirmative Critical Circumstances Determination, in Part*, 82 FR 53473 (November 16, 2017) (collectively, *Hardwood Plywood from China*), and accompanying Issues and Decision Memorandum (IDM) at Comment 1).

³⁶ *Id.* at 13-14.

³⁷ *Id.* at 14-15 (citing *Ad Hoc Shrimp Trade Action Comm. v. United States*, 925 F. Supp. 2d 1315, 1318 (CIT 2013); and *Ad Hoc Shrimp Trade Action Comm. v. United States*, 802 F. 3d 1339, 1357 (CAFC 2015) (*Ad Hoc Shrimp*)).

of its ability. In doing so, Commerce should apply the AFA hierarchy when selecting rates.³⁸

Newtrend Thailand's Rebuttal Brief I³⁹

- Commerce noted in its verification report that there were no other inconsistencies with the information reported in the questionnaire responses. The undisclosed affiliates are located outside of Thailand and could not have received subsidies from the RTG.⁴⁰
- This minor oversight does not warrant the application of AFA as the information at issue was not necessary for Commerce's determination. Newtrend Thailand is the only affiliate located in Thailand, which has been thoroughly investigated by Commerce and did not impede the investigation as to merit AFA to fill a gap on the record.⁴¹
- In *Hardwood Plywood from China*, Commerce determined that the unreported affiliate was required to complete a questionnaire. In *Ad Hoc Shrimp*, the information on the unreported affiliate was "core, non-tangential" to Commerce's separate rate analysis.⁴²
- Newtrend Thailand did not have the opportunity to submit the affiliate information prior to verification, as it did on the record of the companion antidumping investigation.⁴³

Petitioners' Rebuttal Brief IA

- Commerce should apply AFA to Newtrend Thailand for concealing several affiliates until verification, which prevented Commerce from fully examining cross-ownership.⁴⁴

Commerce's Position:

In its affiliation questionnaire response, Newtrend Thailand reported that it did not purchase primarily dedicated inputs for the production of downstream products from affiliates during the POI.⁴⁵ In response to the petitioners' comments on affiliation, Newtrend Thailand reported that all of its affiliates were located in China.⁴⁶ In its initial questionnaire response, in response to Commerce's request for information for all affiliated or unaffiliated trading companies involved with sales of the subject merchandise, Newtrend Thailand reported it is "the only entity that produces and/or sells the merchandise under investigation which is glycine from Thailand."⁴⁷ During verification, Newtrend Thailand reported three previously undisclosed affiliates in its corporate structure chart, which we noted were located either in China or elsewhere outside of

³⁸ *Id.* at 15-16.

³⁹ See Newtrend Thailand's Rebuttal Brief I at 1-4.

⁴⁰ *Id.* at 1-3 (citing CVD Verification Report at 3-4).

⁴¹ *Id.* at 2-3 (citing *Clearon Corp. v. United States*, No. 17-00171, 2019 WL 342719, at 11 (CIT January 25, 2019)).

⁴² *Id.* at 3 (citing *Hardwood Plywood from China* PDM at Section XI.B, unchanged in IDM at Comment 1; and *Ad Hoc Shrimp*, 802 F. 3D 1339, 1357)).

⁴³ *Id.* at 4.

⁴⁴ See Petitioners' Rebuttal Brief IA at 1-3.

⁴⁵ See Newtrend Thailand's Letter, "Glycine from Thailand: Section III Affiliated Parties Response," dated May 16, 2018 (Affiliation Response), at 2.

⁴⁶ See Newtrend Thailand's Letter, "Glycine from Thailand: Response to Petitioners' Comments and Supplemental Section III Affiliated Parties Response," dated May 29, 2018, at 1-2.

⁴⁷ See Newtrend Thailand's Letter, "Glycine from Thailand: Section III Questionnaire Response," dated June 15, 2018 (Questionnaire Response), at 1.

Thailand.⁴⁸ Normally, Commerce’s general practice is to examine cross-ownership between companies located within the country of investigation to see if those companies received subsidies from the government which would be attributable to the respondent, with the exception of trading companies. In this case, unlike *Hardwood Plywood from China*, Newtrend Thailand’s unreported affiliates are not located within Thailand, which is the country of investigation.⁴⁹ Additionally, Newtrend Thailand reported, and we verified, that no trading companies were involved in the production and/or sale of subject merchandise.⁵⁰ Therefore, we find that the application of AFA to Newtrend Thailand is not warranted in this case as the location of Newtrend Thailand’s third-country affiliates has no bearing on the attribution of subsidies in Thailand.

Comment 2: Whether Bangkok Bank is an Authority

Petitioners’ Case Brief I⁵¹

- Newtrend Thailand received significant credit facilities from Bangkok Bank, whose largest shareholder, Thai NVDR Company Limited (Thai NVDR) (32.74 percent), is 99 percent owned by the Stock Exchange of Thailand (SET), a government agency overseen by the Stock and Exchange Commission in Thailand. Commerce confirmed at verification that Newtrend Thailand received one long-term loan and short-term lending from Bangkok Bank during the POI.⁵²
- Bangkok Bank issued loans to Newtrend Thailand when it began operating in Thailand in 2014 and charged Newtrend Thailand for its short-term packing credits at a rate below the Minimum Loan Rate (MLR). In December 2016, Newtrend Thailand failed to “maintain financial ratios” per the loan agreement but Bangkok Bank refused to charge a higher rate or collect additional collateral for the loans and subsequently issued another long-term loan to Newtrend Thailand at the same rates.⁵³
- Bangkok Bank is an “authority” within the meaning of section 771(5) of the Act. Under Commerce’s practice, a government-owned or controlled bank, be it a commercial or policy bank, is considered a public entity or authority under the Act.⁵⁴
- Bangkok Bank’s third largest shareholder is the Social Security Office, another government entity in Thailand. The SET owns the controlling shares of the bank and appears to have at least potential control over it.⁵⁵

⁴⁸ See CVD Verification Report at 3.

⁴⁹ See *Hardwood Plywood from China* IDM at Comment 1.

⁵⁰ See Questionnaire Response at 1; see also CVD Verification Report at 3-4.

⁵¹ See Petitioners’ Case Brief I at 17-32.

⁵² *Id.* at 17 and 20 (citing CVD Verification Report at 8).

⁵³ *Id.* at 18.

⁵⁴ *Id.* at 19 (citing e.g., *Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People’s Republic of China: Final Affirmative Countervailing Duty Determination, Final Affirmative Critical Circumstances Determination*, 75 FR 57444 (September 21, 2010), and accompanying IDM at Comment 10).

⁵⁵ *Id.* at 21.

- In *Refrigerators from Korea*, Commerce found that a 25 percent or more government ownership of the banks could be sufficient to find that a government owns and controls the banks.⁵⁶
- NVDR refers to Non-Voting Depository Receipts, which makes clear that NVDR holders have no voting rights and are not involved in company decision-making. The shareholders and the board of directors of Thai NVDR control the company's decision-making, including control over Bangkok Bank's lending decisions. The three Thai NVDR directors can be tied to the SET, which exerts government control and oversees the investment decisions of Thai NVDR and extends its control over Bangkok Bank as the *de facto* controlling shareholder.⁵⁷
- The RTG provided no information concerning the claimed "beneficial ownership" of the foreign investors that own NVDRs for indirect investment in Bangkok Bank. The RTG's supporting documentation was unusable and should be disregarded by Commerce because it is partially untranslated. The RTG failed to obtain either Commerce's approval for only translating portions of the documents or a waiver not to translate any of them. Therefore, Commerce shall disregard these documents and apply facts otherwise available to fill the gaps on the record and apply an adverse inference to find that Thai NVDR is a government-owned or controlled bank.⁵⁸
- In other cases, Commerce has applied AFA to find that certain producers were "authorities" because the government failed to provide relevant information such as the board of directors and company objectives. Therefore, in this case, Commerce should apply AFA to the RTG and find that Thai NVDR and Bangkok Bank are government authorities.⁵⁹
- In its 2017 annual report, Bangkok Bank listed several government policies in Thailand, including its mission to facilitate trade service clients' business in ASEAN and generate further benefits from China's Belt and Road Initiative.⁶⁰
- Bangkok Bank's loans to Newtrend Thailand at the MRL are not commercially reasonable, as Newtrend Thailand paid low interest expenses compared to the long-term balances after it applied for a waiver to avoid default payment. Bangkok Bank refused to charge a higher rate or collect additional collateral for these loans after Newtrend Thailand failed to maintain financial ratios, but instead issued another long-term loan at the same rates.⁶¹
- A commercial lender "would necessarily examine a firm's projected financial ratios after receipt of a loan" because the lender's priority "is to ensure that it will be repaid in full and on time." No rational, risk-adverse, profit-motivated commercial bank would have

⁵⁶ *Id.* at 21-22 (citing *Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea: Final Affirmative Countervailing Duty Determination*, 77 FR 17410 (March 26, 2012) (*Refrigerators from Korea*) at Comment 24).

⁵⁷ *Id.* at 22-23.

⁵⁸ *Id.* at 23-24.

⁵⁹ *Id.* at 25-26 (citing *Archer Daniels Midland Co. v. United States*, 917 F. Supp. 2d. 1331, 1342 (CIT 2013) (*Archer Daniels Midland*)).

⁶⁰ *Id.* at 26-27.

⁶¹ *Id.* at 27-30.

provided its support and waived its rights to call the loans from a company in default without government influence.⁶²

- The loans provided by Bangkok Bank constitute a financial contribution because of its failure to call Newtrend Thailand's loans immediately, its continual application of the same interest rate for the balance of the loans, and its provision of short-term packing credits at rates below the MLR.⁶³
- The provision of such loans is regionally specific under section 771(5A)(D)(iv) of the Act because the loans are limited to the "trade service clients" that entered the Thai-Chinese Rayong Industrial Estate.⁶⁴
- The loans provide a benefit under section 771(5)(E)(ii) of the Act if there is a difference between the amount the recipient of the loan pays on the loan and the amount the recipient would pay on a comparable commercial loan that the recipient could obtain on the market. As the short-term packing credits were below the market rate and Newtrend Thailand was in a default position, Commerce should use the default rate for speculative grade bonds as reported by Moody's Investor Service to calculate an adjusted benchmark interest rate and measure the benefit conferred by the loans.⁶⁵

Newtrend Thailand's Rebuttal Brief I⁶⁶

- The petitioners did not allege that Bangkok Bank was government owned or controlled, or that any subsidized loan was provided in the Petition or the NSA. Commerce had no cause or reason to investigate Bangkok Bank, which it did not address in the *Preliminary Determination* or Post-Preliminary Determination and Newtrend Thailand did not provide details on the loans received nor did it supply appropriate benchmarks to ensure a complete analysis.⁶⁷
- The RTG stated that Bangkok Bank "is not owned or entrusted by the RTG in any way." Thai NVDR holds only 32.74 percent of shares and is responsible for selling NVDRs to investors. There is no evidence on the record that the RTG exercises any control of Bangkok Bank through Thai NVDR.⁶⁸
- The RTG responded to Commerce's questions regarding Bangkok Bank and does not merit the application of AFA.⁶⁹

⁶² *Id.* at 31 (citing *Archer Daniels Midland*, 917 F. Supp. 2d. at 1347).

⁶³ *Id.* at 31-32 (citing *e.g.*, *Usinor Sacilor v. United States*, 19 CIT 711, 715 (1995)).

⁶⁴ *Id.* at 32.

⁶⁵ *Id.*

⁶⁶ See Newtrend Thailand's Rebuttal Brief I at 4-6.

⁶⁷ *Id.* at 4-5 (citing Petitioners' Letters, "Glycine from the People's Republic of China, India, Japan and Thailand: Petitions for the Imposition of Antidumping and Countervailing Duties," dated March 28, 2018 (Petition), and "Glycine from Thailand: New Subsidy Allegations," dated July 24, 2018 (NSA)).

⁶⁸ *Id.* at 5 (citing RTG's Letter, "Countervailing Duty Investigation of Glycine from Thailand: Royal Thai Government Response to New Subsidy Allegation Supplemental Questionnaire," dated October 22, 2018, at 1-2).

⁶⁹ *Id.* at 6.

RTG's Rebuttal Brief I⁷⁰

- The three percent ownership of the Social Security Office is too small for Commerce to conclude that Bangkok Bank is government owned or controlled.⁷¹
- Thai NVDR's shares consist of NVDRs, which are negotiable securities for indirect foreign investment in companies like Bangkok Bank in situations where the foreign investor cannot by law own the shares directly.⁷²
- Thai NVDR buys Bangkok Bank's securities and issues NVDR certificates to private foreign buyers representing beneficial ownership and not for Thai NVDR to exercise voting control over Bangkok Bank.⁷³
- The RTG does not exercise ownership or control of Bangkok Bank through the SET as it is a commercial bank.⁷⁴

Commerce's Position:

Under 19 CFR 351.505(a)(6)(ii), absent an allegation that a loan is a financial contribution, is specific and provides a benefit, Commerce will not investigate a loan provided by a government-owned bank. In this case, the petitioners requested in their comments on questionnaire responses to ask about a loan provided by Bangkok Bank to Newtrend Thailand.⁷⁵ As such, Commerce followed-up with RTG to inquire about the ownership of Bangkok Bank.⁷⁶ The RTG's response indicated that Bangkok Bank is a commercial bank and that its largest shareholder is Thai NVDR Company Limited, followed by other shareholders that are commercial entities.⁷⁷ Based on the information provided by the RTG, the loan provided to Newtrend Thailand by Bangkok Bank does not "appear to be a countervailable subsidy," as provided by section 775 of the Act. Therefore, consistent with our regulations, we did not issue any further supplemental questionnaires.⁷⁸ While we lack certain information on ownership and the terms of the loan, the information we do have on the record does not lead us to believe Bangkok Bank is a public body which provided a financial contribution on preferential terms that was specific. We also do not find it appropriate to apply AFA in this instance because the RTG fully responded to our supplemental questionnaire and we did not seek further information afterwards. Based on this

⁷⁰ See RTG Rebuttal Brief I at 3-6.

⁷¹ *Id.* at 3.

⁷² *Id.* at 3-4.

⁷³ *Id.* at 5.

⁷⁴ *Id.* at 6.

⁷⁵ See Petitioners' Letters, "Glycine from Thailand: Comments on Newtrend Thailand's Response to the Section III Questionnaire and RTG's Response to the Department's Section II Questionnaire," dated July 6, 2018, "Glycine from Thailand: Comments on Newtrend Food Ingredient (Thailand) Co., Ltd.'s July 12, 2018 Response to the Department's June 29, 2018 Supplemental Questionnaire," dated July 23, 2018, and "Glycine from Thailand: Comments on Newtrend Thailand's July 30, 2018 Supplemental Questionnaire Response," dated August 9, 2018.

⁷⁶ See Commerce's Letter, "Countervailing Duty Investigation of Glycine from Thailand: New Subsidy Allegations Supplemental Questionnaire," dated October 3, 2018.

⁷⁷ See RTG's Letter, "Countervailing Duty Investigation of Glycine from Thailand: Royal Thai Government Response to New Subsidy Allegation Supplemental Questionnaire," dated October 22, 2018, at 1-2.

⁷⁸ See, e.g., *Oil Country Tubular Goods from the Republic of Turkey: Preliminary Results of Countervailing Duty Administrative Review*; 2016, 83 FR 51440 (October 11, 2018), and accompanying PDM at 3, unchanged in *Oil Country Tubular Goods from the Republic of Turkey: Final Results of Countervailing Duty Administrative Review*; 2016, 84 FR 11504 (March 27, 2019).

record and consistent with the statute and our regulations, we find there is no “appearance of a countervailable subsidy” and therefore, we will not countervail the Bangkok Bank loan.

Comment 3: Whether the Provision of Electricity for LTAR is Countervailable

RTG’s Case Brief I⁷⁹

- Commerce should find that the electricity rates for Newtrend Thailand were consistent with market principles because the rates were charged according to the standard pricing mechanism set by the Energy Regulatory Commission (ERC) of Thailand.⁸⁰
- Commerce has previously interpreted the concept of “the government’s price setting philosophy” set in the *CVD Preamble*⁸¹ as whether the government is following a “standard pricing mechanism.”⁸²
- Commerce correctly stated that in calculating the various components of the uniform electricity tariffs, the ERC considers the costs of all three utilities with the goal to “set tariffs comparable to the marginal costs” and applies the same retail tariffs to all end-users within the same usage category in all regions.⁸³
- Consistent with Commerce’s practice in evaluating the provision of electricity for LTAR by the Korean Electric Power Corporation (KEPCO) in CVD investigations of steel products from Korea, Commerce should find the provision of electricity for LTAR in Thailand not countervailable. To find the program not countervailable in those CVD investigations of steel products from Korea, Commerce examined whether the electricity prices charged to the respondent company were consistent with KEPCO’s standard pricing mechanism.⁸⁴
- Commerce’s contrary post-preliminary conclusion in this investigation was erroneous because it disregarded the overall cost analysis by the ERC when setting the tariffs for the entirety of Thailand.
- Commerce’s analysis segregating the Metropolitan Electricity Authority (MEA) and Provincial Electricity Authority (PEA) costs was erroneous because the differences are due to the form of corporate structuring rather than the substantive costs.

⁷⁹ See RTG’s Case Brief I at 1-2 and 4-7.

⁸⁰ *Id.* at 1.

⁸¹ See *Countervailing Duties; Final Rule*, 63 FR 65348, 65378 (November 25, 1998) (*CVD Preamble*).

⁸² See RTG’s Case Brief at 2 (citing *Maverick Tube Corp. v. United States*, 273 F. Supp. 3d 1293, 1299 n.6 (*Maverick Tube*) (“stating that Commerce and the Court used the terms ‘price-setting philosophy’ and ‘standard pricing mechanism’ interchangeably”); *Nucor Corp. v. United States*, 286 F. Supp. 3d 1364, 1371 (CIT 2018) (“Commerce chose to examine the government’s price-setting philosophy by looking at whether KEPCO had a standard pricing mechanism and whether the prices it charged were consistent with that mechanism.”), *appeal docketed*, No. 18-1787 (CAFC 2018); and *Final Affirmative Countervailing Duty Determinations: Pure Magnesium and Alloy Magnesium From Canada*, 57 FR 30946, 30949 (July 13, 1992) (*Magnesium from Canada*) (“If the rate charged is consistent with the standard pricing mechanism and the company under investigation is, in all other respects, essentially treated no differently than other industries which purchase electricity, we would probably not find a countervailable subsidy.”)).

⁸³ See RTG’s Case Brief I at 4-5.

⁸⁴ *Id.* at 4 (citing *Maverick Tube*, 273 F. Supp. 3d at 1299; *Nucor Corp. v. United States*, 286 F. Supp. 3d at 1366, 1369, 1371 (*Nucor*); *POSCO v. United States*, 296 F. Supp. 3d 1265, 1280-82 (CIT 2018); and *POSCO v. United States*, 296 F. Supp. 3d 1320, 1328 (CIT 2018)).

- Commerce mistakenly drew “artificial distinctions with no grounding in economic reality.”⁸⁵ Any distinctions are the mere result of the corporate structuring of the two state-controlled retailers, MEA and PEA. If MEA and PEA, were to merge into one corporate entity, the economic reality from the standpoint of the RTG and from the standpoint of industrial users would be the same.
- Commerce’s “market principles” analysis make it impossible for the RTG to set electricity tariffs in a manner that it is not countervailable.⁸⁶
- Commerce’s interpretations of price setting philosophy, cost, and price discrimination factors make it impossible for the RTG to set tariffs in a manner that resulted in “adequate remuneration.”⁸⁷ For example, if the ERC did not average the power loss factor when setting the variable rate, and instead set different retail Ft’s (*a.k.a.*, fuel adjustment charges)⁸⁸ for the MEA and PEA so that they could “equally pass down their actual policy costs to the end-users,” it would require by definition for the ERC to establish “price discrimination.”⁸⁹
- Differences in MEA’s and PEA’s costs do not cause the provision of electricity in Thailand to be regionally specific.⁹⁰
- Commerce erred in this investigation, as it did in *Hot-Rolled from Thailand*,⁹¹ by finding regional specificity. The vast majority of electricity in Thailand goes to PEA customers. Although MEA customers pay more relative to the cost of distribution, customers located outside of Bangkok do not receive regionally-specific subsidies because they pay less. Such interpretation would lead to illogical results (*e.g.*, Commerce could find regional specificity if the MEA-served customers who paid higher rates located in only one square block in Bangkok, while the PEA served customers paying lower rates in the rest of Bangkok and Thailand).⁹²

Petitioners’ Rebuttal Brief IB⁹³

- Commerce should continue finding the provision of electricity for LTAR in Thailand countervailable.⁹⁴
- The RTG conceded that certain discounts on electricity to the PEA were necessary due to the higher costs of electricity supply in the provincial areas.⁹⁵ Consequently, Newtrend Thailand would otherwise have to pay higher prices due to the higher costs of electricity distribution.

⁸⁵ See RTG’s Case Brief I at 6.

⁸⁶ *Id.* at 6.

⁸⁷ *Id.* at 7.

⁸⁸ See Post-Preliminary Determination at 4 for additional details regarding the components of the Fts.

⁸⁹ *Id.* at 7.

⁹⁰ *Id.*

⁹¹ See *Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products from Thailand*, 66 FR 50410 (October 3, 2001) (*Hot-Rolled from Thailand*), and accompanying IDM at II.B. “Provision of Electricity for Less than Adequate Remuneration.”

⁹² *Id.*

⁹³ See Petitioners’ Rebuttal Case Brief IB at 1, 4, 6-8, and 12.

⁹⁴ *Id.* at 1.

⁹⁵ *Id.* at 4.

- Because of those cost distinctions, it does not matter which Thai authority oversees the tariff-setting policy for analyzing the countervailability of this program.⁹⁶
- RTG's hypothetical merger between the MEA and PEA argument is speculation, and Commerce should base its decision on the record evidence, not speculation.
- RTG's hypothetical merger argument is meritless because whether the MEA and PEA merge or not, the costs of electricity supply to the provincial areas will still be higher; and under the same uniform tariff policy, it will amount to provision of electricity for LTAR.
- RTG's reliance on Korean steel cases is misplaced because those cases stemmed from Commerce's analysis of provision of electricity at LTAR program in *Welded Line Pipe from Korea* and *Corrosion-Resistant Steel from Korea*.⁹⁷ In both of those decisions, unlike the Thai electricity program in this case, Commerce had first determined that the Korean electricity standard pricing mechanism was consistent with market principles.
- In *Corrosion-Resistant Steel from Korea*, Commerce distinguished the Thai electricity program in the *Hot-Rolled Steel Flat Products from Thailand* by stating that Thailand did not have a standard price-setting mechanism because electricity distribution costs were accounted for in two different methods for the MEA and PEA.
- RTG's argument that because of Commerce's post-preliminary findings it would be impossible to set electricity tariffs in a manner that is not countervailable is unpersuasive. Contrary to the RTG's arguments, differing tariffs in various regions would not automatically make the provision of electricity countervailable.
- Commerce should reject the RTG's challenge against the post-preliminary regional specificity finding.⁹⁸ RTG has not cited any legal authority for its proposition that because the majority of electricity goes to the PEA customers, there is no regional specificity. The Court rejected similar arguments in *Royal Thai Gov't*.⁹⁹

Commerce's Position:

We continue to find the provision of electricity for LTAR in Thailand countervailable. When examining the provision of a good for LTAR using a tier three benchmark, Commerce conducts a market principles analysis which considers the following factors: price setting philosophy, costs (including rates of return sufficient to ensure future operations), and possible price discrimination.¹⁰⁰ When conducting a market principles analysis for a provision of electricity for LTAR where the rates are charged according to a standard pricing mechanism, Commerce first examines how the government establishes its electricity rates (*i.e.*, a market principles analysis) and then determines whether the respondent paid a lower rate than other comparable companies

⁹⁶ *Id.* at 6-7.

⁹⁷ *Id.* at 8 (citing *Welded Line Pipe from the Republic of Korea: Final Negative Countervailing Duty Determination*, 80 FR 61365 (October 13, 2015) (*Welded Line Pipe from Korea*), and accompanying IDM at Section VI.B.1; and *Countervailing Duty Investigation of Certain Corrosion-Resistant Steel Products from the Republic of Korea: Final Affirmative Determination, and Final Affirmative Critical Circumstances Determination, in Part*, 81 FR 35310 (June 2, 2016) (*Corrosion-Resistant Steel from Korea*), and accompanying IDM at Comment 2).

⁹⁸ *Id.* at 12.

⁹⁹ *Id.* (citing *Royal Thai Gov't v. United States*, 441 F. Supp. 2d 1350, 1356 (CIT, 2006) (*Royal Thai Gov't*)).

¹⁰⁰ See *CVD Preamble*, 63 FR at 65378.

or industries.¹⁰¹ Whether we call the first factor to be considered in market principles analysis a “price-setting philosophy” or “standard pricing mechanism,” this factor weighs against finding that Thai electricity prices are set according to market principles. The Thai electricity price-setting philosophy (*i.e.*, standard pricing mechanism) is not consistent with market principles, as we have thoroughly analyzed in our Post-Preliminary Determination and accompanying analysis memorandum.¹⁰² Moreover, we have already distinguished the Korean and Thai fact patterns in *Corrosion-Resistant Steel from Korea*. Therefore, the fact that at first glance Newtrend Thailand may have paid the same rate as other comparable consumers is irrelevant.

Commerce is also not persuaded by the RTG’s other arguments. First, having a single electricity distributor and retailer in Thailand would be irrelevant for finding this program countervailable under the uniform tariff-setting policy due to inherent cost differentials between supplying electricity to Bangkok metropolitan and provincial areas. Second, although the ERC considered costs of all utilities in setting the electricity tariffs, in setting the uniform tariffs it disregarded that electricity distribution costs to the PEA customers were higher than those to the MEA customers. Moreover, ERC’s actions were consistent with the overarching RTG policy of decentralizing development to provincial areas through electricity pricing. Third, it is not impossible to set Thai electricity rates in a manner that is not countervailable. Setting different prices for different types of customers alone does not automatically make the provision of electricity countervailable. Price discrimination is only one factor in analyzing whether the electricity tariffs were set according to market principles. If price discrimination was due to cost differences, such price discrimination would most likely not be a factor for finding the program countervailable. Finally, our regional specificity finding does not lead to illogical results. Even in the hypothetical presented by the RTG where the higher-paying customer base represented only one block in Bangkok, if such a small number of customers paid so much more for the electricity as to subsidize the cost of electricity for the rest of the country, and the subsidization would result in a measurable benefit to the respondent, then finding such program countervailable would be logical. In any event, Commerce does not see any legitimate reason for overturning its regional specificity finding in *Hot-Rolled from Thailand* which was upheld by the Court of International Trade (CIT).¹⁰³ Therefore, we continue to find that the RTG provided electricity to Newtrend Thailand at LTAR and that the RTG’s provision of electricity was regionally specific to the provincial areas.

¹⁰¹ See *Maverick Tube*, 273 F. Supp. 3d at 1300 (“{Commerce} first examines how the government-owned utility company sets its rates and then determines whether a respondent receives a price that is better than that afforded other companies or industries purchasing comparable amounts of electricity.”) (citing *Magnesium from Canada*, 57 FR at 30949).

¹⁰² See Post-Preliminary Determination; see also Memorandum, “Post-Preliminary Determination Calculations,” dated February 21, 2019.

¹⁰³ See *Royal Thai Gov’t*, 441 F. Supp. 2d at 1350.

Comment 4: Whether Commerce Should Have Used Thai Electricity Export Prices as a Benchmark in the Provision of Electricity for LTAR Benefit Calculation

Petitioners' Case Brief I¹⁰⁴

- Commerce should have used the Electricity Generating Authority of Thailand's (EGAT) export electricity prices to "overseas independent power producers" as a tier two or tier three benchmark instead of making a "market principles" tier three analysis.
- Although the EGAT is a state-owned, statutory entity, the government electricity price is not *per se* an invalid benchmark.¹⁰⁵
- In *Softwood Lumber from Canada*, Commerce used an electricity rate of a government-owned entity as a valid benchmark and rejected the argument that a rate from a government-owned entity cannot be used as a benchmark.¹⁰⁶
- Similarly, Commerce should not reject the EGAT's electricity export prices to overseas independent power producers merely because the EGAT is a state-owned, statutory corporation.
- Additionally, the EGAT's export electricity prices should be used because they represent "international cross-border transmission or distribution" prices that would otherwise be available to consumers in Thailand.¹⁰⁷

RTG's Rebuttal Brief I¹⁰⁸

- If Commerce continues to find the provision of electricity for LTAR countervailable, it should continue relying on its post-preliminary calculation methodology and not rely on exported electricity prices as a benchmark because the EGAT prices charged to parties abroad are not "world market" prices, and therefore, do not represent a legitimate tier two benchmark.¹⁰⁹
- Commerce correctly noted in its post-preliminary analysis that the nature of electricity markets prevents examining a world market price because, unlike other commodities, no purchaser could obtain electricity on the world market.
- The petitioners rely on *Welded Line Pipe from the Republic of Korea* and *Supercalendered Paper from Canada* to argue that the EGAT's export prices constitute a valid tier two benchmark; however, those cases are inapposite because they address whether there are any imports of electricity into the subject country, not exports.¹¹⁰
- The petitioners also rely on *Softwood Lumber from Canada* to argue that although the EGAT is a state-owned, statutory entity, its prices are not *per se* an invalid benchmark.

¹⁰⁴ See Petitioners' Case Brief I at 35.

¹⁰⁵ *Id.* at 35.

¹⁰⁶ *Id.* at 35 (citing *Certain Softwood Lumber from Canada*, 82 FR 51814 (November 8, 2017) (*Softwood Lumber from Canada*), and accompanying IDM at Comment 54).

¹⁰⁷ *Id.* (citing *Welded Line Pipe from Korea* IDM at 16; see also *Supercalendered Paper from Canada: Final Affirmative Countervailing Duty Determination*, 80 FR 63535 (October 20, 2015) (*Supercalendered Paper from Canada*), and accompanying IDM at 42).

¹⁰⁸ See RTG's Rebuttal Brief I at 6-9.

¹⁰⁹ *Id.* at 6.

¹¹⁰ *Id.* at 7 (citing *Welded Line Pipe from Korea* IDM at 16 ("with respect to electricity, {Commerce} has stated that electricity prices from countries in the world market are normally not available to purchasers in the country under investigation."); and *Supercalendered Paper from Canada* IDM at 42).

However, *Softwood Lumber from Canada* represented a different fact pattern, Commerce considered whether it could use as a benchmark a rate charged by a state-owned entity to a respondent-producer where the case involved an allegation that the state-owned entity paid more than adequate remuneration (MTAR) to the respondent-producer for electricity that it sold back to the state-owned entity.¹¹¹ Additionally, Commerce explained that its three-tier benchmark hierarchy does not apply to MTAR programs.¹¹²

- Because the provision of electricity in this case concerns an LTAR allegation and not MTAR, *Softwood Lumber from Canada* is inapposite.

Commerce's Position:

We continue to rely on our post-preliminary, tier three market principles analysis for calculating the benefit for the provision of electricity for LTAR. We address the petitioners' arguments in three parts below.

First, by arguing that state ownership alone should not be sufficient to disregard the EGAT's export prices as a benchmark, it appears that the petitioners misunderstood our reasoning in the post-preliminary analysis. Our decision to disregard certain of the EGAT's export electricity prices was not based solely on the state-ownership issue. In the Post-Preliminary Determination we provided two primary and one supporting reason for why the EGAT's export electricity prices to Laos do not represent a valid benchmark.¹¹³ We restate and elaborate our reasoning for why export prices to Laos do not represent a valid benchmark as follows: (1) those prices were wholesale prices, and therefore, not comparable to the retail prices at issue; (2) export prices from the country being investigated for providing subsidies cannot be deemed "world market prices"; and (3) as a supporting reason, those export prices are for electricity sold by the same state-owned entity (EGAT) through which, *inter alia*, the RTG provided electricity for LTAR to Newtrend Thailand. In the Post-Preliminary Determination, we specifically addressed export prices to Laos; however, the petitioners advocate to use the export electricity prices to "independent power producers." The same reasoning that applied to electricity export prices to Laos also applies to electricity export prices to "independent power producers." Additionally, in their case brief, the petitioners selected only one out of many of the EGAT's export electricity price averages without providing any reason for doing so.

Second, the RTG correctly noted that the cases cited by the petitioners to argue that the EGAT's export electricity prices represent a valid tier two benchmark are inapposite because those cases considered whether there were export prices into the country of the investigation that would otherwise be available to consumers of that country. In any event, the prices at which the EGAT sells to overseas independent power producers are not available to consumers in Thailand because consumers in Thailand must pay for electricity according to a tariff structure. Similarly, the RTG also correctly noted that *Softwood Lumber from Canada*, cited by the petitioners, was related to a purchase of electricity by the government for MTAR; therefore, our three-tier benchmarking hierarchy did not apply. Thus, we are not persuaded by those cases cited by the petitioners.

¹¹¹ *Id.* at 8-9 (citing *Softwood Lumber from Canada* IDM at Comment 54, at 171-73).

¹¹² *Id.*

¹¹³ See Post-Preliminary Determination at 8.

Third, the petitioners did not provide any arguments or citations to legal authority to attempt to overcome the issue of comparability. The EGAT is an electricity wholesaler and its electricity sales, including sales to overseas independent power producers, represent wholesale prices. Wholesale prices are not comparable to the retail prices, the adequacy of remuneration of which we are trying to determine.

Comment 5: Whether the Exemptions of Import Duty on Raw or Essential Materials Imported for Use in Production for Export (IPA Section 36) Program is Countervailable

Petitioner's Case Brief I¹¹⁴

- In *Hot-Rolled Steel from Thailand*, which was affirmed by the Federal Circuit (CAFC), Commerce countervailed the benefits under IPA Section 36. The CAFC stated that a benefit exists when the drawback is more than the amount of import charges on imported inputs that are actually consumed in the production of the exported product, making normal allowances for waste.¹¹⁵
- In *CTL Plate from India*, Commerce found that the drawback system was not reasonable because government officials “had no way of confirming whether imported inputs were actually consumed in the production of {exported product}” and “had no way of knowing whether home market inputs were used in the production of the exported product or whether imported inputs are used to produce products destined for export or the domestic market.”¹¹⁶
- In *Hot-Rolled Steel from Thailand*, Commerce found that “the RTG’s system for determining which inputs are consumed in the exported product, and in what amounts, is not reasonable or effective for the purposes intended” and found all exemptions granted to be countervailable export subsidies. Commerce noted that the RTG did not isolate and examine what was consumed in the production of the exported product and whether any scrap was recoverable, which is essential in determining normal waste allowance.¹¹⁷
- In the *Preliminary Determination*, Commerce found IPA Section 36 to be not countervailable, following *Citric Acid from Thailand* and *PET Resin from Thailand*. In *PET Resin from Thailand*, Commerce did not provide an explanation for its change from *Hot-Rolled Steel from Thailand* and found that the regulatory requirement was satisfied because the RTG submitted company-specific production formulas.¹¹⁸

¹¹⁴ See Petitioners’ Case Brief I at 36-44.

¹¹⁵ *Id.* at 36-37 (citing *Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Steel Flat Products from Thailand*, 66 FR 50410 (October 3, 2001) (*Hot-Rolled Steel from Thailand*), and accompanying IDM at Section II.A.3, affirmed by *Royal Thai Government v. United States*, 436 F. 3d 1330, 1338-41 (CAFC 2006) (*Royal Thai*)).

¹¹⁶ *Id.* at 37-38 (citing *Final Affirmative Countervailing Duty Determination: Certain Cut-to-Length Carbon-Quality Steel Plate from India*, 64 FR 73131 at 73138-39 (December 29, 1999) (*CTL Plate from India*)).

¹¹⁷ *Id.* at 38-39 (citing *Hot-Rolled Steel from Thailand* IDM at Section II.A.3).

¹¹⁸ *Id.* at 39-40 (citing *Preliminary Determination* PDM at 5-7; *Citric Acid and Certain Citrate Salts from Thailand: Final Negative Countervailing Duty Determination*, and *Final Negative Critical Circumstances Determination*, 83 FR 26004 (June 5, 2018) (*Citric Acid from Thailand*) and accompanying IDM at Section VI.B.1; and *Final Negative*

- In *Citric Acid from Thailand*, Commerce misinterpreted the regulation and asserted that the regulatory requirement about actual consumption is satisfied with company-specific production formulas. Commerce did not explain how the company-specific production formula tracks the actual consumption of the imported inputs.¹¹⁹
- Commerce has been inconsistent with its practice on duty drawback programs between *Hot-Rolled Steel from Thailand* and *PET Resin from Thailand*, *Citric Acid from Thailand*, and the *Preliminary Determination*.¹²⁰
- Nothing on the record indicates that the stock and production formulas track Newtrend Thailand's actual consumption of imported inputs. The RTG Verification Report only shows that the production formula aligned with the company's self-reported maximum value and with other companies producing similar products. The RTG only needed to verify the maximum stock recorded in the raw materials tracking system (RMTS).¹²¹
- The RTG's system does not verify Newtrend Thailand's accounting record to determine the actual consumption of imported inputs for production of exported products and whether the maximum amount for which the system allows them to claim exemption exceeds the import charges they would have paid on the inputs consumed in the production of the exported product.¹²²

Newtrend Thailand's Rebuttal Brief I¹²³

- In *Citric Acid from Thailand* and *PET Resin from Thailand*, Commerce found IPA Section 36 to be not countervailable. The findings in *Hot-Rolled Steel from Thailand* from 2001 are superseded by the findings in *PET Resin from Thailand* in 2004 and *Citric Acid from Thailand* in 2018.¹²⁴
- Commerce examined the functionality of IPA Section 36 during the RTG verification and found no discrepancies with the information on the record.¹²⁵

RTG's Rebuttal Brief I¹²⁶

- The petitioners have no grounds to challenge the legitimacy and completeness of Commerce's verifications as Commerce has latitude in its verification procedures.¹²⁷
- Commerce verified Newtrend Thailand's universe of raw materials in its raw materials general ledger accounts during the POI and traced the import of raw materials through the export of subject merchandise with source documentation.¹²⁸

Countervailing Duty Determination: Bottle-Grade Polyethylene Terephthalate (PET) Resin from Thailand, 70 FR 13462 (March 1, 2005) (*PET Resin from Thailand*) and accompanying IDM at Section III.B).

¹¹⁹ *Id.* at 41-42 (citing *Citric Acid from Thailand* IDM at Comment 3).

¹²⁰ *Id.* at 42-43.

¹²¹ *Id.* at 43-44 (citing RTG Verification Report at 7).

¹²² *Id.* at 44.

¹²³ See Newtrend Thailand's Rebuttal Brief I at 8.

¹²⁴ *Id.* at 8 (citing *Hot-Rolled Steel from Thailand*, *PET Resin from Thailand*, and *Citric Acid from Thailand* IDM at 14 and Comment 3).

¹²⁵ *Id.* (citing RTG Verification Report at 7-9).

¹²⁶ See RTG's Rebuttal Brief I at 10-14.

¹²⁷ *Id.* at 10-11 (citing *Kerr-McGee Chem. Corp. v. United States*, 739 F. Supp. 613, 628 (CIT 1990)).

¹²⁸ *Id.* at 11 (citing CVD Verification Report at 6).

- Commerce verified the BOI tracking process of raw material inputs and final products in the RMTS system to make sure that Newtrend Thailand does not claim import tariff exemptions for a greater quantity of inputs than needed to manufacture the final product.¹²⁹
- In *Hot-Rolled Steel from Thailand*, Commerce found that the drawback monitoring system did not take into account the use of steel scrap and the discrepancies regarding steel scrap recovery and resale.¹³⁰
- In this case, Newtrend Thailand's two imported inputs do not carry concerns about possible scrap recovery and resale. Therefore, this case does not have the factors present in *Hot-Rolled Steel from Thailand* and Commerce should continue to find that this program is not countervailable.¹³¹

Commerce's Position:

We disagree with the petitioners' claim that Commerce's decision in *Hot-Rolled Steel from Thailand* to countervail the IPA Section 36 program should compel Commerce to countervail the program in the instant investigation. As the petitioners state, we subsequently found the IPA Section 36 program to be not countervailable in *PET Resin from Thailand* and *Citric Acid from Thailand*. In addition, we note that each of Commerce's determinations stands on its own based on the particular evidentiary record developed in each proceeding. As the name implies, the CVD investigation on *Hot-Rolled Steel from Thailand* dealt with alleged subsidies provided to the Thai hot-rolled steel industry. Part of that investigation examined subsidies during the period covering the calendar year 2001. Subsequent to that investigation, Commerce has examined the IPA Section 36 program as it pertains to the bottle-grade PET resin industry covering the calendar year 2003 and found that the RTG had an adequate monitoring system in place that did not result in excessive drawback that would give rise to a countervailable subsidy benefit. The program was further examined as it pertains to the citric acid industry covering the calendar year 2016, and we made a similar finding in *PET Resin from Thailand*.

In both *PET Resin from Thailand* and *Citric Acid from Thailand*, Commerce examined the IPA Section 36 program and found that the RTG's method for deriving company-specific production formulas was accurate and that the RTG had a reasonable and effective system in place to monitor and track the consumption and/or re-export of goods imported, making normal allowance for waste.¹³² In the *Preliminary Determination*, Commerce utilized the same analytical framework as in *PET Resin from Thailand* and *Citric Acid from Thailand* to evaluate the system in place during the POI based on the information obtained during this investigation, and concluded that the RTG continued to have a drawback system under the IPA Section 36 program that effectively monitored the consumption and re-export of imported goods.¹³³ During verification, we discussed with RTG officials the production formula approval process. RTG officials indicated that they verified Newtrend Thailand's production formula by comparing the

¹²⁹ *Id.* at 11-12 (citing RTG Verification Report at 8-9).

¹³⁰ *Id.* at 13 (citing *Hot-Rolled Steel from Thailand* IDM at Section II.A.3; and *Royal Thai*, 437 F. 3d at 1340).

¹³¹ *Id.* at 14.

¹³² See *PET Resin from Thailand* IDM at 9; see also *Citric Acid from Thailand* IDM at 25.

¹³³ See *Preliminary Determination* PDM at 5-7.

quantities of raw materials needed to be imported to produce one unit of the final exported product with the production process provided in Newtrend Thailand's BOI-approved project.¹³⁴ The production formula and the maximum stock are closely monitored in the RMTS, which tracks by company-specific codes the amounts of raw material inputs imported and the final product exported, as requested by users such as Newtrend Thailand.¹³⁵

Newtrend Thailand supplied its stock and production formulas to Commerce in its questionnaire responses, and at verification we confirmed the accuracy of, and found no discrepancies with regard to, the company-specific production formula and maximum stock that Newtrend Thailand submitted to the RTG under the Section 36 IPA program.¹³⁶ We also verified that Newtrend Thailand allocated a certain percentage of raw material imports for domestic production, on which it paid customs duties and VAT, if applicable, based on the production formula and maximum stock provided to the BOI.¹³⁷ Finally, at verification, Newtrend Thailand demonstrated its use of the BOI portal website, in which it inputs the documentation and spreadsheets for both the import of the raw materials and the export of the final product.¹³⁸ Therefore, we find that the system the RTG used to monitor and track which inputs, and in what amounts, were consumed in the production of the finished good for export was reasonable and effective and, thus, that the duty exemptions on raw materials used by Newtrend Thailand in its production of glycine under the IPA Section 36 program was not excessive and, accordingly, not countervailable.

Comment 6: Application of AFA

Petitioners' Case Brief II¹³⁹

- AFA is warranted because Newtrend Thailand submitted fraudulent responses and data which Commerce was unable to verify. Thus, Newtrend Thailand has not acted to the best of its ability and significantly impeded this investigation by withholding relevant information.¹⁴⁰
- Commerce's verification findings confirm CBP's findings concerning Newtrend USA's transshipment of Chinese-origin glycine and the record evidence calls into question the reliability and accuracy of Newtrend Thailand's questionnaire responses in their entirety.¹⁴¹
- The Courts have upheld that fraudulent responses may suffice to support Commerce's refusal to rely on any of that tainted data in its calculations.¹⁴²

¹³⁴ See RTG Verification Report at 7.

¹³⁵ *Id.* at 8.

¹³⁶ See CVD Verification Report at 6-7.

¹³⁷ *Id.* at 6.

¹³⁸ *Id.*

¹³⁹ See Petitioners' Case Brief II at 6-19.

¹⁴⁰ *Id.* at 15-16.

¹⁴¹ *Id.* at 16.

¹⁴² *Id.* at 16 (citing *Papierfabrik August Koehler SE v. United States*, 843 F. 3d 1373, 1374 (CAFC 2016) (referencing *Ad Hoc Shrimp Trade Action Comm. v. United States*, 802 F. 3d 1339, 1355-57 (CAFC 2015))).

- The *CBP Interim Measures* provide Commerce with sufficient evidence to apply total AFA to Newtrend Thailand in this investigation.¹⁴³
- Newtrend Thailand's recordkeeping and its other behavior are consistent with masking the "laundering" of Chinese crude or finished glycine through its newly-constructed facility in Thailand.¹⁴⁴
- Because Newtrend Thailand engaged in a deceitful scheme to trick Commerce to consider its transshipped sales of glycine in its countervailing duty calculation, Commerce should make an inference adverse to Newtrend Thailand.¹⁴⁵
- Commerce's second cost verification findings indicate that Newtrend Thailand significantly underreported its yield loss associated with transforming crude glycine into work-in-progress (WIP) glycine.¹⁴⁶
- Commerce's second cost verification findings indicate that Newtrend Thailand was unable to show that Newtrend Thailand was capable of producing 1.00 metric ton of crude glycine with 1.26 MT of monochloroacetic acid (MCA) using the MCA production process for each of the examined calendar years (*i.e.*, 2015, 2016, and 2017) and the two selected months (*i.e.*, March and April 2019).¹⁴⁷
- In recalculating the company's MCA consumption to account for the corrected yield loss noted above, Commerce's cost verification findings indicate that Newtrend Thailand's MCA usage amount does not support its reported quantity of glycine produced.¹⁴⁸
- As AFA, Commerce should use its hierarchy to apply the highest above *de minimis* rates from Thailand to each program.¹⁴⁹
- If the combined rates for the previous Thai programs do not rise above *de minimis*, Commerce should rely on the rate utilized in the *CBP Interim Measures* and apply the all-others rate in the CVD investigation of glycine from China because Newtrend Thailand has mislabeled Chinese-origin glycine as Thai-origin glycine.¹⁵⁰
- The Thai Department of Foreign Trade (DFT) foreign trade data referred to in *CBP Interim Measures* and which Commerce did not access in its investigation does not support Newtrend Thailand's claim that it exported the amount of glycine it claimed it produced to the United States during each of the examined years.¹⁵¹
- This fact is another red flag indicating that at least a portion of Newtrend Thailand claimed subject merchandise was in fact transshipped from China and that a cover-up occurred.¹⁵²

¹⁴³ *Id.* at 16.

¹⁴⁴ *Id.* at 17.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 6-7.

¹⁴⁷ *Id.* at 6-7 (citing 2nd Cost Verification Report at 15-16).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 18-19.

¹⁵⁰ *Id.* at 19

¹⁵¹ *Id.* at 12 (citing *CBP Interim Measures* at 3).

¹⁵² *Id.* at 11.

- The CBP data Commerce placed on the record supports a finding that Newtrend Thailand transshipped Chinese-origin glycine through Thailand to the United States during the POI.¹⁵³
- Newtrend Thailand's Chinese affiliate, Jiangxi Ansun Chemical Technology Co., Ltd. (Jiangxi Ansun), produced glycine for export to customers located in Thailand and other export destinations.¹⁵⁴
- There is a connection between Jiangxi Ansun's sales data and the CBP data showing that at least one of Jiangxi Ansun's sales of Chinese-produced glycine entered the United States labeled as Thai-origin glycine from Newtrend Thailand during the POI.¹⁵⁵

Newtrend Thailand's Case Brief II¹⁵⁶

- At the second sales verification, Commerce confirmed that Newtrend Thailand did not engage in a transshipment scheme after thoroughly examining the sale and purchase records of Newtrend Thailand and its Chinese affiliates for each of three examined calendar years.¹⁵⁷
- Commerce reconciled intercompany sales to each affiliated company to the intercompany sales consolidation worksheet and entries contained in the Newtrend Technology financial statements for each of the three years. For 2017, Commerce reconciled the CVD sales denominators to the financial statements or tax return.¹⁵⁸
- At the second cost verification, Commerce also confirmed that Newtrend Thailand did not engage in a transshipment scheme by observing its two-batch production process and its crude glycine packing and storage process; and tying its fixed assets costs, its batch-specific and crude glycine production costs, its raw material and crude glycine consumption costs and inventory values from its accounting records to data in its financial statements for the three examined calendar years.¹⁵⁹
- Commerce's average yield calculation in the 2nd Cost Verification Report fails to take into account the quantity of solid glycine converted from mother liquor (*i.e.*, the first error) and the recycled mother liquor converted to solid glycine (*i.e.*, the second error) during the production process even though its production technique flow chart shows that it uses mother liquor as an input in the "dissolve" stage of production and mother liquor is an output in the "centrifugation" stage of production.¹⁶⁰
- Although the amount of solid glycine converted from mother liquor input can be derived from data contained in the cost verification exhibits, the information necessary to calculate the recycled mother liquor that is converted into solid glycine is not on the record.¹⁶¹

¹⁵³ *Id.* at 14 (citing Memorandum, "Release of Customs Data from U.S. Customs and Border Protection (CBP)," dated April 30, 2019).

¹⁵⁴ *Id.* at 15 (citing 2nd Sales Verification Report at verification exhibit VE2-26C).

¹⁵⁵ *Id.* at 15.

¹⁵⁶ See Newtrend Thailand's Case Brief II at 3 and 5-16.

¹⁵⁷ *Id.* at 5-8 (citing 2nd Sales Verification Report at 3-17).

¹⁵⁸ *Id.* at 5 (citing 2nd Sales Verification Report at 3-17).

¹⁵⁹ *Id.* at 8-13 (citing 2nd Cost Verification Report at 7-13).

¹⁶⁰ *Id.* at 12-13 (citing 2nd Cost Verification Report at 2 and verification exhibit CVE-3).

¹⁶¹ *Id.* at 12-13 (citing 2nd Cost Verification Report at verification exhibits CVE-3 and CVE-8).

- The reason the information necessary is not on the record is because Commerce never requested it.¹⁶²
- Without the recycled mother liquor data which is part of the total WIP glycine production quantity, Commerce's yield calculation is incorrect and produces results which appear to show that the company's reported MCA consumption is lower than necessary to produce the reported quantity of finished glycine.¹⁶³
- The proper yield calculation presented in its May 20 SQR does not show that the reported MCA consumption is lower than that necessary to produce the reported finished glycine production amount.¹⁶⁴
- In addition to the two errors above, Commerce also double counted the yield loss of refined glycine in its average yield calculation contained in Table 2 of the 2nd Cost Verification Report because its calculation of crude glycine to WIP glycine double counts the consumption of WIP for white bags, yellow bags, and pink bags as a result of the calculation of WIP glycine to finished glycine already including the consumption from crude glycine in supersacks, white bag, yellow bag and pink bag to finished glycine in paper bags and supersacks.¹⁶⁵
- The 2017 "WIP glycine transfer-out to FG glycine (Reported)" quantity figure in Table 2 of the 2nd Cost Verification Report is incorrect and should instead reflect the quantity figure reported in its May 20 SQR.¹⁶⁶
- The same correction made to the "WIP glycine transfer-out to FG glycine (Reported)" quantity figure should also be made to the "Crude glycine Transfer-out to WIP glycine" quantity figure in Table 1 of the 2nd Cost Verification Report based on data contained in the May 20 SQR.¹⁶⁷
- If Commerce had shown its revised yield calculation to Newtrend Thailand during verification, the company would have provided Commerce with all the relevant information to perform its average yield calculation.
- Because Commerce did not provide it the opportunity at verification to address the above-referenced calculation errors, Commerce should not penalize it for Commerce's erroneous average yield calculation.¹⁶⁸ Commerce's revised yield calculations fail to take into account the input and output quantity of mother liquor.¹⁶⁹
- Newtrend Thailand stands ready to provide missing information from the record to properly complete the consumption rate worksheets and associated yield calculations.¹⁷⁰
- Newtrend Thailand fully cooperated with all of Commerce's requests for information in this investigation.¹⁷¹

¹⁶² *Id.* at 13.

¹⁶³ *Id.*

¹⁶⁴ *Id.* and Attachment 4.

¹⁶⁵ *Id.* at 14 (referencing 2nd Cost Verification Report at Table 2).

¹⁶⁶ *Id.* at 15 and Attachment 4.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 16 (citing *Olympic Adhesives, Inc. v. United States*, 899 F. 2d 1565, 1574 (CAFC 1990); *JSW Steel Ltd. v. United States*, 315 F. Supp. 3d 1379, 1383 (CIT 2018); and *Prosperity Tieh Enterprise Co., Ltd. v. United States*, 284 F. Supp. 3d 1364, 1380 (CIT 2018)).

¹⁶⁹ *Id.* at 13.

¹⁷⁰ *Id.* at 16.

¹⁷¹ *Id.* at 3.

Petitioners' Rebuttal Brief II¹⁷²

- With respect to Newtrend Thailand's contention that Commerce's sales verification findings noted no instances of Chinese-origin glycine transshipped by Newtrend Thailand or any of its affiliates to the United States, these findings do not and cannot explain or negate other discrepancies noted above, including Newtrend Thailand's MCA usage and the yield loss in transforming crude glycine into WIP glycine and CBP's mention in the *CBP Interim Measures* of two entries during 2018 it was investigating which indicated that transshipment occurred.¹⁷³
- Newtrend Thailand attempts to introduce an equation to calculate the yield loss transforming crude glycine into WIP glycine after Commerce found and established that such a yield loss existed.¹⁷⁴
- Newtrend Thailand's newly-proposed correction is meritless and untimely and was only raised because Commerce's verification findings contradicted the company's claim regarding its yield loss.¹⁷⁵
- Newtrend Thailand's argument that it did not have the opportunity at verification to show how Commerce's yield loss calculation is incorrect at verification should be rejected because accepting it at this stage would cause unfair prejudice to other interested parties.¹⁷⁶
- Commerce should disregard Newtrend Thailand's late proposed correction to the yield loss between crude glycine and WIP glycine, which was withheld from Commerce until the submission of the company's case brief.¹⁷⁷
- While Newtrend Thailand argues that Commerce double-counted the consumption of WIP glycine, the company's proposed correction requires Commerce to double-count the crude glycine quantity that Commerce has already used in its yield calculation.¹⁷⁸
- Newtrend Thailand is unable to dispute that the yield loss between crude glycine and WIP glycine actually existed and the fact that the yield loss does exist contradicts Newtrend Thailand's claim that it had sufficient inputs to produce the reported production quantity and undermines the accuracy of its actual yield calculation for MCA and finished glycine.¹⁷⁹
- As a result of Newtrend Thailand misleading Commerce in its reported actual yield calculation for MCA and finished glycine by withholding information for a critical step in the production process (*i.e.*, the yield loss in converting crude glycine into WIP glycine) and then not proposing its correction until faced with contradictory evidence Commerce pointed out in the verification report, Commerce should apply total AFA to Newtrend Thailand based on Court precedent.¹⁸⁰

¹⁷² See Petitioners' Rebuttal Brief II at 2-7, 9, and 12-14.

¹⁷³ *Id.* at 5-6.

¹⁷⁴ *Id.* at 9.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 12.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 12-13 (citing *Jiangsu Changbao Steel Tube Co., Ltd. v. United States*, 884 F. Supp. 2d 1295 (CIT 2012)).

- Newtrend Thailand could have submitted the missing information to accurately report its MCA yield throughout the course of this investigation within the deadlines set by Commerce but failed to do so, and its offer to submit new factual information to address this significant deficiency violates regulatory deadlines and prejudices the petitioners.¹⁸¹
- These discrepancies call into question the reliability and accuracy of Newtrend Thailand's questionnaire responses in their entirety and show that Newtrend Thailand withheld information from Commerce and repeatedly misled Commerce.¹⁸²
- Commerce's second round of verifications corroborated the information in CBP's decision that Newtrend Thailand's reported MCA consumption does not support its reported finished glycine production.¹⁸³

Newtrend Thailand's Rebuttal Brief II¹⁸⁴

- Commerce's yield calculations are incorrect because not only did Commerce fail to take into account the input and output of mother liquor during the production process as described in the Product Technique Flow Chart, but it also double-counted the yield loss of refined glycine.¹⁸⁵
- Commerce's yield loss calculation does not show that Newtrend Thailand's consumption and production records expose a transshipment scheme and Commerce should not assume that a transshipment occurred given Commerce's sale's verification findings of no evidence that Newtrend Thailand received any crude or finished glycine.¹⁸⁶
- Newtrend Thailand states that Commerce's sales and cost verification report findings demonstrate that Newtrend Thailand did not engage in any sort of transshipment scheme.¹⁸⁷
- Commerce's 2nd Sales Verification Report clearly notes that there was no evidence of sales of either crude or finished glycine from any of Newtrend Thailand's affiliated companies to Newtrend Thailand.¹⁸⁸
- The petitioners' insinuation that Jiangxi Ansun's sales of glycine to a Thai company somehow indicates that the glycine from those sales ended up in Newtrend Thailand's inventory is not supported by evidence.¹⁸⁹

Commerce's Position:

As an initial matter, with respect to this CVD investigation, we have not considered the parties' arguments regarding cost of production (COP) as these arguments solely relate to the calculation of normal value in the LTFV investigation. In a CVD investigation, Commerce is concerned with determining whether an "authority" provides a financial contribution which confers a

¹⁸¹ *Id.* at 14.

¹⁸² *Id.* at 7.

¹⁸³ *Id.* at 2-7.

¹⁸⁴ *See* Newtrend Thailand's Rebuttal Brief II at 14 and 16-17.

¹⁸⁵ *Id.* at 14.

¹⁸⁶ *Id.* at 16-17.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 9.

¹⁸⁹ *Id.*

benefit to the recipient and whether that subsidy is specific in accordance with section 771(5A) of the Act.¹⁹⁰

The CVD and LTFV investigations of glycine from Thailand have distinct records which focus on the relevant aspects of each proceeding. However, because of the nature of the allegations underlying the *CBP Interim Measures*, the joint AD/CVD verifications and verification reports, and case briefs relevant to the matter on the records of each proceeding, Commerce finds itself in the position of having overlapping records, the result of which is the placement of COP information on the CVD record, which is not normally relevant in a CVD proceeding. Because the COP information on this record, in the context of supplemental questionnaire responses and a verification report, has no bearing on the analysis or calculations normally contemplated by the Act as being relevant to a CVD investigation, we are not addressing the parties' COP arguments within this context.¹⁹¹

Further, we have not addressed the following cost-related arguments raised by the parties in their case briefs:

- Other Production Related Issues;¹⁹²
- Newtrend Thailand's Production Process is Not Possible;¹⁹³ and
- Newtrend Thailand's Reported MCA Purchases Are Not Supported by *CBP Interim Measures*.¹⁹⁴

With respect to the petitioners' argument that AFA under section 776(b) of the Act is warranted, we disagree. Specifically, we find that Newtrend Thailand has not met the requirements for the application of AFA, as it has not withheld information, failed to provide timely information, significantly impeded this proceeding, or provided information that cannot be verified. Throughout the course of this CVD investigation, Newtrend Thailand has cooperated with Commerce's requests for information, and we have no evidence that it failed to answer Commerce's requests for information to the best of its ability. Further, we have no evidence that Newtrend Thailand has significantly impeded this CVD proceeding, or provided information pertinent to our CVD calculation which could not be verified. Therefore, we find no basis for the application of facts available with an adverse inference.

With respect to the DFT foreign trade data, as an initial matter, we note that the information in question is in the possession of CBP and is confidential. Further, it is not on our record, and therefore cannot be considered.

¹⁹⁰ See, generally, section 771(5)(B) of the Act.

¹⁹¹ For COP issues, see *Glycine from Thailand: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances in Part*, dated concurrently with this memorandum, and accompanying IDM.

¹⁹² See Petitioners' Case Brief II at 6-14; Newtrend Thailand's Case Brief II at 11-16; and Newtrend Thailand's Rebuttal Brief II at 2-4.

¹⁹³ See Petitioners' Case Brief II at 10; and Newtrend Thailand's Rebuttal Brief at 2-3.

¹⁹⁴ See Petitioners' Case Brief II at 11-12.

With respect to the petitioners' arguments concerning the CBP data, we are unable to draw the same conclusions as the petitioners based on our verification findings.¹⁹⁵ However, CBP is continuing to investigate this matter. Specifically, we note that, with regard to the underlying evasion by means of transshipment allegations addressed in the *CBP Interim Measures*, CBP is continuing to investigate this issue under its own statutory authority pursuant to section 517 of the Act. CBP's independent evasion investigation is separate from Commerce's AD and CVD investigations. CBP is expected to issue the final determination in its independent investigation pursuant to the requirements of section 517. Additionally, Commerce intends to provide CBP with record evidence from our investigations.

Comment 7: *CBP Interim Measures*

Petitioners' Case Brief II¹⁹⁶

- Commerce would ultimately usurp CBP's enforcement prerogative and frustrate the purpose behind the EAPA if it does not pay significant deference to the *CBP Interim Measures* findings.¹⁹⁷
- Commerce should give substantial weight to CBP's findings in its *CBP Interim Measures* given Commerce's practice to refer customs fraud matters to CBP and rely on CBP to identify discrepancies that contradict the record of Commerce's investigation.¹⁹⁸
- The U.S. Supreme Court decisions demonstrate that the *CBP Interim Measures* contain "specialized experience" and, thus, deserves deference in Commerce's consideration of its final determination.¹⁹⁹
- Though CBP's EAPA investigation initiated under the lower "reasonable suspicion" evidentiary standard, the CIT has viewed that the "reasonable suspicion" standard requires specific, objective, and particular evidence similar to a "substantial evidence" standard and, thus, views the standards as interchangeable. Therefore, CBP imposes interim measures decisions for duty evasion under a high evidentiary standard that, although not final, are based on well-reasoned analysis of law.²⁰⁰
- Given the high evidentiary standard used in *CBP's EAPA Interim Measures* decisions, Commerce should pay significant deference to the *CBP Interim Measures* findings despite the fact that the decision is not final.²⁰¹
- Congress has repeatedly urged Commerce to closely partner and coordinate with CBP in AD/CVD enforcement matters "to increase efforts and advance methods to better investigate foreign imports suspected of evading or circumventing AD/CVD orders" ²⁰²

¹⁹⁵ See 2nd Sales Verification Report at 9-14.

¹⁹⁶ See Petitioners' Case Brief II at 20-28.

¹⁹⁷ *Id.* at 20.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 20-23 (citing *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (*United States v. Mead Corp.*); and *Skidmore vs. Swift & Co.*, 323 U.S. 134, 140 (1944) (*Skidmore v. Swift*)).

²⁰⁰ *Id.* at 22-27.

²⁰¹ *Id.* at 20.

²⁰² *Id.* at 27.

- CBP's EAPA investigation is enforcing Commerce's AD order on glycine from China²⁰³ on identical merchandise from China that Newtrend Thailand attempted to circumvent by misrepresenting it as Thai origin.²⁰⁴
- Because of Congress' legislative intent, and consistent with Commerce's practice, Commerce should pay deference to CBP's findings. Otherwise, if Commerce were to negate CBP's findings, CBP would be forced to yield to a decision in conflict with its *CBP Interim Measures* decision.²⁰⁵

Newtrend Thailand's Rebuttal Brief II²⁰⁶

- The petitioners' claims that Commerce should give substantial weight to CBP's findings in its *CBP Interim Measures* decision is an unreasonable interpretation of administrative law.²⁰⁷
- The decisions in three court decisions cited to by the petitioners concern the degree of deference a court should pay to an agency interpreting a statute where the agency in question is in charge of administering the statute being interpreted. Thus, these cases apply solely to the degree of deference a court should pay to an agency's interpretation of a statute, not to any findings of fact.²⁰⁸
- Those same court decisions concern the degree of deference by courts paid to agency decisions, not deference paid by one agency to the findings of another. Further, none of the aforementioned cases discuss whether one agency may or must defer to a decision by a separate agency. Instead, the doctrines from the aforementioned cases concern the deference paid to an agency's interpretation of a statute it administers and addresses only the extent to which a reviewing court must defer to "an agency administering its own statute."²⁰⁹
- Those same court decisions all concerned final agency interpretations of the statutes they administered. Additionally, under the Administrative Procedures Act, courts can review only "final agency action." Specifically, under the EAPA, the statute provides for court review of only a completed EAPA review.²¹⁰
- Commerce cannot rely on CBP assertions made under a "reasonable suspicion" standard.²¹¹
- Contrary to the petitioners' assertions, previous CIT rulings have not viewed the "reasonable suspicion" and "substantial evidence" evidentiary standards as interchangeable, nor have previous CIT rulings proposed that a determination based on a "reasonable suspicion" evidentiary standard is a satisfactory substitute for a final determination based on substantial evidence on the record.²¹²

²⁰³ See *Antidumping Duty Order: Glycine from the People's Republic of China*, 60 FR 16116 (March 29, 1995).

²⁰⁴ *Id.* at 28.

²⁰⁵ *Id.*

²⁰⁶ See Newtrend Thailand's Rebuttal Brief II at 13-21.

²⁰⁷ *Id.* at 13-17.

²⁰⁸ *Id.* (citing *United States v. Mead Corp.*, *Skidmore v. Swift*, and *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (*Chevron U.S.A. v. NRDC*)).

²⁰⁹ *Id.*

²¹⁰ *Id.* at 17 (citing *United States v. Mead Corp.*, *Skidmore v. Swift*, and *Chevron U.S.A. v. NRDC*).

²¹¹ *Id.* at 17-19.

²¹² *Id.*

- The petitioners conflate the *CBP Interim Measures* decision with CBP's final determination, which is yet to occur. Such a decision will be non-existent if CBP rules that no transshipment occurred in this case.²¹³
- The petitioners are essentially requesting Commerce to subordinate its own independent investigation into transshipment allegations within the context of AD and CVD investigations to CBP's investigation, which is not responsible for making AD and CVD determinations.²¹⁴

Petitioners' Rebuttal Brief II²¹⁵

- Contrary to Newtrend Thailand's assertions, substantial evidence on the record supports finding that Newtrend engaged in a fraudulent transshipment scheme.²¹⁶
- This investigation contains significant discrepancies concerning Newtrend Thailand's record for its major raw materials, production, and accounting information. The only explanation for the aforementioned discrepancies is that Newtrend Thailand transshipped a portion of glycine, claimed to have been manufacturer in Thailand, from China to Thailand. Newtrend Thailand has not specifically challenged the veracity of the factual information that CBP relied on for its *CBP Interim Measures* decision.²¹⁷
- CBP, having access to information outside the purview of Commerce's investigation, made its *CBP Interim Measures* decision based on a high evidentiary standard.²¹⁸
- The discrepancies on the record of this investigation warrants Commerce's application of AFA pursuant to section 776(a) of the Act.²¹⁹

Commerce's Position:

Commerce gave the *CBP Interim Measures* due weight in deciding to postpone the final determinations of these investigations. However, Commerce disagrees with the petitioners that we owe deference to the *CBP Interim Measures*.

Under the AD and CVD laws, Commerce is charged with reviewing the evidence on the administrative record of the proceeding to arrive at a determination of the rate of dumping or subsidization. The *CBP Interim Measures* constitute record evidence which Commerce must analyze and address. The *CBP Interim Measures* findings are preliminary, not final. As noted above, CBP is continuing to investigate the allegations under its own authority pursuant to section 517 of the Act.

We previously found that the *CBP Interim Measures* raise serious questions about the accuracy of information reported by Newtrend Thailand to Commerce. The *CBP Interim Measures* state that "there is a reasonable suspicion that Newtrend USA entered covered merchandise into the

²¹³ *Id.* at 20.

²¹⁴ *Id.*

²¹⁵ See Petitioners' Rebuttal Brief II at 2-7.

²¹⁶ *Id.* at 2.

²¹⁷ *Id.* at 2-5.

²¹⁸ *Id.* at 6.

²¹⁹ *Id.* at 7.

customs territory of the United States through evasion by means of transshipment through Thailand.”²²⁰ These alleged transshipments involved potential shipments of Chinese glycine to the United States without declaring the merchandise as subject to the AD order on glycine from China. Furthermore, the *CBP Interim Measures* state that Newtrend Thailand failed to cooperate with CBP’s investigation. Thus, the *CBP Interim Measures* raised questions about the integrity of the information reported on the administrative records of Commerce’s investigations, prior to the statutory deadlines for the final determinations. Therefore, Commerce decided to postpone issuance of the final determinations to further investigate these issues. In doing so, Commerce gave due weight to the *CBP Interim Measures*.

However, Commerce is not required to treat the findings in the *CBP Interim Measures* as though they are final determinations, nor is Commerce required to follow CBP determinations in its own investigations. In the facts of this particular case, it would be inappropriate for Commerce to disregard Newtrend Thailand’s submitted and verified data on the basis of the *CBP Interim Measures* alone. Commerce is responsible for making its own independent factual findings on the basis of the administrative records of its own investigations, and applying the AD and CVD laws to those factual findings. Commerce has done so in this instance.

VII. RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting the above positions. If this recommendation is accepted, we will publish the final determination of the investigation in the *Federal Register* and will notify the International Trade Commission of our determination.

☒
☐

Agree

Disagree

7/29/2019

X 

Signed by: JEFFREY KESSLER

Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance

²²⁰ *CBP Interim Measures* at 4. The term “covered merchandise” is defined as merchandise that is subject to an AD or CVD order. See section 517(a)(3) of the Act.